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No. 87-1651

In The
Supreme Court of the United States
October Term, 1988

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,
v.
DOUGLAS L. OAKES,
Respondent.

On Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

I. DID THE COURT BELOW PROPERLY DEEM MASSACHUSETTS GENERAL LAW C. 272 § 29A INVALID ON ITS FACE BECAUSE ITS SWEEPING PROHIBITION AGAINST NUDITY PER SE PERMITS COUNTLESS IMPERMISSIBLE APPLICATIONS TO THE PROTECTED CONSTITUTIONAL ACTIVITIES OF NUMEROUS OTHERS?

II. WHETHER MASSACHUSETTS GENERAL LAW C. 272 § 29A RUNS AFOUL OF FIRST AMENDMENT OVERBREADTH DOCTRINE AS IT RELATES TO THE RESPONDENT?

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STATEMENT OF THE CASE

On January 9, 1985, the respondent, Mr. Douglas Oakes, was indicted by a Worcester County Grand Jury and charged with posing a person under eighteen years of age for pornographic purposes in violation of Massachusetts General Law c. 272 §§ 29a, 31. Joint Appendix, p. 3a (hereinafter, "J.A. (page)").

On March 21, 1985, Mr. Oakes filed with Worcester Superior Court, a Request to Report the issue of the constitutionality of the statute, to the Appeals Court of Massachusetts pursuant to Rule 24 of the Massachusetts Rules of Criminal Procedure. J.A. 6a. The respondent also filed a Motion to Dismiss the indictment on the grounds that the statute violated the Massachusetts and United States Constitutions. J.A. 4a. On July 16, 1985 the Superior Court denied the Motion to Dismiss and the Request for Report. J.A. 1a.

On October 10, 1985 Mr. Oakes was tried before a jury and found guilty. The following facts were presented to the jury:

The respondent, Mr. Douglas Oakes, is the step-father of the complainant, Miss Laurie Supernor. In 1983, Miss Supernor, at age fourteen, decided to pursue a modeling career. In that same year, she enrolled in LaFemmina Modeling School, J.A. 19a, and thereafter entered several beauty pageants. J.A. 38a-39a. Miss Supernor had pictures taken of her at the modeling school. J.A. 27a. She also modeled at home where Mr. Oakes took photos of his daughter for the purpose of assembling a modeling portfolio. J.A. 27a. Mrs. Oakes would also take pictures of her daughter on occasion. J.A. 40a.

This case centers around ten photographs purportedly taken by Mr. Oakes in 1984. The photos show Miss Supernor, then fourteen, sitting with her breasts partially exposed. J.A. 21a-22a, 26a-27a. These select photos which were introduced at trial do not display any private parts of the subject's lower body. The photos do not and were not argued by the Commonwealth to depict the subject engaged in any sexually explicit conduct or sexually suggestive act. All ten photos show the subject in the same attire with her breasts partially covered. J.A. 22a.

On October 11, 1985 Mr. Oakes was sentenced to serve a term of imprisonment of ten years at Massachusetts Correctional Institute at Concord.

Both the evidence adduced at trial and the jury instructions given by the trial judge make clear that the respondent was convicted under the first proscribed offense —exhibiting a person under 18 years of age in a state of nudity. J.A. 10a-13a. The record is devoid of any evidence suggesting the minor was depicted or was engaged in sexually explicit conduct.

Further, even though the state of nudity which the subject was in was limited to the partial exposure of her breasts, the jury brought back a conviction after being instructed that nudity included the "uncovered post pubertal human female breast".

On November 7, 1985 a Notice of Appeal was timely filed to the Appeals Court of the Commonwealth of Massachusetts. This appeal was subsequently transferred, sua sponte, to the Supreme Judicial Court of Massachusetts.

On February 3, 1987 the case was argued before the Full Court of the Supreme Judicial Court. On February 1, 1988 the Supreme Judicial Court reversed Mr. Oakes' conviction and dismissed the indictment holding that Massachusetts General Law c. 272 § 29A was unconstitutionally overbroad.

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SUMMARY OF THE ARGUMENT

I

First Amendment rights are fundamental and thus a challenge is appropriate when an overbroad statute abridges said rights. Among these fundamental rights is freedom of speech. The nature of these rights gives rise to the doctrine of overbreadth which gives an individual standing to challenge statutes that abridge First Amendment rights even if the individual's rights are not directly affected. This doctrine arises because of the propensity of an overbroad statute to chill protected behavior merely because of a fear of prosecution. Overbreadth doctrine staunchly protects First Amendment rights. (pages 6-9).

The statute in question proscribes both conduct and pure speech. The statute proscribes traditionally protected forms of expression; the taking, developing and dissemination of photographs. The application of overbreadth doctrine is appropriate in the instant case because the protected speech cannot be divorced from conduct. (pages 9-11).

The overbreadth of Massachusetts General Law c. 272 § 29A is substantial and was properly invalidated by the

Massachusetts Supreme Judicial Court. A statute is overbroad when on its face and in fact, a substantial number of instances exist where the statute infringes protected rights. In the instant case, a substantial number of these instances indeed exist. The statute proscribes behavior that is clearly protected like a parent photographing a naked child romping on the beach. Thus, the statute was properly invalidated as overbroad. (pages 11-17).

II

The statute in question is unconstitutional as it relates to respondent. Under this Court's decision in *Ferber,* nudity not involving sexual conduct, even if children are involved retains First Amendment protection. The pictures which led to respondent's conviction are devoid of any act or pose, that can even remotely resemble sexual conduct. The respondent's conviction is a quintessential illustration of "the hand of the censors becoming unduly heavy". *New York v. Ferber,* 458 U.S. 747, 756 (1982). The statute in question, as is evidenced in the present case, is unconstitutionally overbroad because it absolutely proscribes conduct and speech which has heretofore been recognized as protected expression under the First Amendment. (pages 17-22).

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ARGUMENT

I. MASSACHUSETTS GENERAL LAW c. 272 § 29A IS PROPERLY DEEMED INVALID ON ITS FACE BECAUSE ITS SWEEPING PROHIBITION AGAINST NUDITY PER SE PERMITS COUNTLESS IMPERMISSIBLE APPLICATIONS TO THE PROTECTED CONSTITUTIONAL ACTIVITIES OF NUMEROUS OTHERS.

A. An Overbroad Statute Is Appropriately Challenged When First Amendment Rights Are Abridged.

First Amendment rights are fundamental and thus a challenge is appropriate when an overbroad statute abridges those rights. As this Court states, " the right to exercise the liberties safeguarded by the First Amendment 'lies at the foundation of free government by free men' and we must in all cases 'weigh the circumstances and appraise * * * the reasons * * * in support of [those] rights.' " *Marsh v. State of Alabama,* 326 U.S. 501, 509 (1946) quoting *Schnieder v. State,* 308 U.S. 147, 161 (1939).

Among these fundamental and closely protected rights is that of freedom of speech. "The freedom of speech . . ., which [is] secured by the First Amendment against abridgment by the United States, [is] among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a state." *Thornhill v. State of Alabama,* 310 U.S. 88, 95 (1940); see *Chaplinsky v. State of New Hampshire,* 315 U.S. 568, 570 (1942). This Court's words in a case in which the petitioner was convicted by a state court for attempting to incite insurrection reflect this tenet,

"[t]he power of a state to abridge freedom of speech . . . is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government." *Herndon v. Lowry,* 301 U.S. 242, 258 (1937).

The nature of these freedoms gives rise to the doctrine of overbreadth which staunchly guards these fundamental rights. The doctrine carves out "an exception to the rule that individuals generally may not litigate the rights of third parties." L. Tribe, American Constitutional Law §§ 12-27 at 1023 (1988). "[A] litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court." *Village of Schaumberg v. Citizens for a Better Environment,* 444 U.S. 620, 634; reh. den. 445 U.S. 972 (1980). See *City of Lakewood v. Plain Dealer Publishing Co.,* 108 S.Ct. 2138, 2143 (1988). Even in instances where a statute could be applied against an individual, this Court states that:

> The Court has repeatedly held that such a statute may be challenged on its face even though a more narrowly drawn statute would be valid as applied to the party in the case before it. This exception from the general rule is predicated on 'a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.'" *Members of City Council v. Taxpayers for Vincent,* 466 U.S. 789, 798-799 (1984) quoting *Broadrick v. Oklahoma,* 413 U.S. 601, 612 (1973).

It is indeed the general rule rather than the exception in cases involving these intrinsic rights that a party has

standing to challenge a statute even if the individual's rights are not directly abridged by an overbroad statute.

This overbreadth doctrine has evolved because "the very existence of some statutes may cause persons not before the Court to refrain from engaging in constitutionally protected speech or expression." *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 60; reh. den. 429 U.S. 873 (1976). "[T]he transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" *Gooding v. Wilson,* 405 U.S. 518, 521 (1972) quoting *Baggett v. Bullitt,* 377 U.S. 360, 366 (1964). A challenge is allowed in order to insure that free speech is not chilled by an overbroad law. An overbroad statute could prevent individuals from engaging in constitutionally protected speech merely because of fear of prosecution. *Secretary of State of Maryland v. Joseph H. Munson Co.,* 467 U.S. 947, 957 (1984). As Justice Marshall stated, an overbroad statute "hangs over [individuals] heads like a sword of Damocles." *Arnett v. Kennedy,* 416 U.S. 134, 231 (Marshall dissenting); reh. den. 417 U.S. 977 (1974). See L. Tribe, American Constitutional Law, §§ 12-27, p. 1023 (1988). First Amendment rights are staunchly protected to insure that individuals are not inhibited from employing these constitutionally protected rights.

B. Massachusetts General Law c. 272 § 29A Attempts To Limit The Fundamental Right Of Free Speech.

The statute in question proscribes both conduct and pure speech. The statute prohibits, in relevant part, any person from hiring, coercing, soliciting, employing, procuring, using, causing, encouraging or knowingly permitting a person under eighteen years of age to pose or be exhibited in a state of nudity for purposes of representation or reproduction in a book, magazine, pamphlet, motion picture film, photograph or picture. Massachusetts General Law c. 272 § 29A.

The statute proscribes not only conduct, the physical taking of pictures, but also the development and dissemination of said pictures in "traditional forms of expression such as books and films." *New York v. Ferber,* 458 U.S. 747, 771 (1982). See also, e.g. *Lerman v. Flynt Distributing Co., Inc.,* 745 F.2d 123 (2nd Cir. 1984); cert. den. 471 U.S. 1054 (1975) (magazine pictures as speech); *Erznoznick v. City of Jacksonville,* 422 U.S. 205 (1975) (motion pictures as speech). As the Massachusetts Supreme Judicial Court stated in its opinion below:

> Photography is a form of expression which is entitled to First Amendment protection just as the written or spoken word is protected. Photography as a means of communication and expression can be strikingly informative, as in the works of Mathew Brady and Margaret Bourke-White. It can be inspirationally expressive, as Ansel Adams demonstrated. Although not every picture may be worth a thousand words, in a First Amendment sense a picture is worth at least one. *Commonwealth v. Oakes,* 401 Mass. 602, 604 (1988).

Speech cannot be divorced from conduct in situations like the present:

> To base first amendment [sic] rights entirely on a speech-nonspeech distinction semantically avoids confronting the issue of what expression we will protect under the first amendment [sic] and what we will not. 'A constitutional distinction between speech and nonspeech has no content. A constitutional distinction between speech and conduct is specious. Speech *is* conduct, and actions speak.' *Griffin v. State of Florida,* 396 So.2d 152, 158 (Fla. 1981) (Sundberg, C.J. concurring specially and dissenting in part) quoting Henkin, *The Supreme Court, 1967 Term—Forward: On Drawing Lines,* 82 Harv. L. Rev. 63, 79 (1968) (emphasis in the original). See *State v. Helgoth,* 691 S.W.2d 281, 287 (Mo. 1985) (Welliver, J. dissenting); Note, *Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Legislation,* 12 U.Mich.L.J.Ref. 295, 309 (1975) ("Because child pornography production and distribution involves visual material, legislation regulating such material must be considered with due regard for first amendment [sic] freedoms.") See also Note, *Child Pornography: A New Role for The Obscenity Doctrine,* 1978 U.ILL. L.F. 711, 743 n. 156.

Finally this court has employed overbreadth analysis on several occasions when both speech and conduct are present. See *Broadrick* at 601 (banning political activities by civil service employees); *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1968) (the wearing of black armbands). In a situation most analagous to the instant case, this Court held that a New York statute prohibiting persons from knowingly promoting sexual performances by a minor by distributing material which depicted these performances should be invali-

dated if the statute was substantially overbroad. "As we intimated in *Broadrick,* the requirement of substantial overbreadth extended 'at the very least' to cases involving conduct plus speech." *Ferber* at 771. Thus even in instances where, like the present, speech and conduct are mixed, an overbroad statute is encompassed by the protection of the First Amendment and overbreadth analysis.

C. Massachusetts General Law c. 272 § 29A Is Substantially Overbroad And Was Properly Invalidated By The Massachusetts Supreme Judicial Court.

The overbreadth of Massachusetts General Law c. 272 § 29A is substantial and was properly invalidated by the Massachusetts Supreme Judicial Court. As previously stated, Massachusetts General Law c. 272 § 29A prohibits, *inter alia,* any person from hiring, coercing, soliciting, employing, procuring, using, causing, encouraging or knowingly permitting a person under eighteen years of age to pose or be exhibited in a state of nudity for purposes of representation or reproduction in a book, magazine, pamphlet, motion picture film, photograph or picture.

Further, Massachusetts General Law c. 272 § 31 defines nudity as:

> uncovered or less than opaquely covered post-pubertal human genitals, pubic areas, the post-pubertal human female breast below a point immediately above the top of the areola, or the covered male genitals in a discernibly turgid state. For the purposes of this definition a female breast is considered uncovered if the nipple or areola only are covered. In the case of pre-pubertal persons nudity shall mean uncovered or less than opaquely covered pre-pubertal human genitals or pubic area.

These two statutory provisions permit many impermissible applications that compromise First Amendment speech and thus M.G.L. c. 272 § 29A was properly invalidated.

In instances like the present where both speech and conduct are intertwined "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick* at 615. As this Court most recently stated, "[t]o succeed in [a] challenge, [an individual] must demonstrate from the text of the Law and from actual fact that a substantial number of instances exist in which the Law cannot be applied constitutionally." *New York State Club Association, Inc. v. City of New York,* 108 S.Ct. 2225, 2234 (1988). See *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 800 (1984); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494; reh. den. 456 U.S. 950 (1982). Further, in instances like the present, "[c]riminal statutes must be scrutinized with particular care." *City of Huston, Texas v. Hill,* 107 S.Ct. 2502, 2508 (1987). Thus, petitioner's contention that, in fact, this statute has not been applied unconstitutionally has no bearing on the statute's overbreadth and constitutionality. The actual application of the statute need not be considered because the statute's chilling effect may have deterred individual's constitutionally protected activities and thus, the statute's true effect would not be reflected by the records of prosecution pursuant to it. The unconstitutional effect of a statute can indeed be real without even one unconstitutional prosecution under it. The chilling effect as shown

on the statute's face is the factor that must be considered when determining overbreadth.[1]

In the instant case, both the "text of the Law" and "actual fact" indeed demonstrate that "a substantial number of instances exist in which the Law cannot be applied constitutionally." See *New York State Club Association, Inc.* at 2234. Even when, as in this case, the interests of minors are involved, the breadth of a statute must still be limited. "While children do not have first amendment rights co-extensive with adults, there are limits to government's ability to restrict the freedom of speech on the ground of protecting minors." *Upper Midwest Booksellers Association v. City of Minneapolis,* 602 F.Supp. 1361, 1366 (Minnesota, 1985). See *State v. Frink,* 653 P.2d 553, 555 (Oregon, 1982) ("Although a state may, consistent with the First Amendment, impose stricter controls over materials made available to minors than on those available to adults, not all nudity may be proscribed.")

In the instant case the statute in question is overbroad. The statute fais to be properly limited. The statute "criminalizes conduct that virtually every person would regard as lawful. Section 29A, for example, makes a criminal of a parent who takes a frontal view picture of his or her naked one-year-old running on a beach or romping in a wading pool." *Commonwealth v. Oakes,* 401 Mass. at 605. See *Erznoznik* at 212 (Statute overbroad where ordinance "might prohibit newsreel scenes or the opening

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1. Respondent submits that petitioner's use of an appendix listing information regarding prosecutions pursuant to c. 272 § 29A is improper and introduces information outside the record of the instant case.

of an art exhibit as well as shots of bathers on a beach.") See also *American Book-Sellers Association, Inc. v. Hudnut,* 771 F.2d 323, 332 (7th Cir. 1985); aff. 475 U.S. 1001; reh. den. 475 U.S. 1132 (1986) (Indianapolis statute "left out of its definition any reference to literary, artistic, political, or scientific value.") Further, pursuant to the statute in question, the mother who proudly stands by and watches the father take a picture of the child on the beach is literally "permitting" this picture taking and is also committing a criminal act. The statute would also prohibit a police detective from taking a picture of a child murder victim lying naked on the floor. A child war victim, lying nude, shown in a newsreel would fall within the definition of nudity.

Furthermore, puberty is defined as that period of life at which one becomes functionally capable of reproduction. *Taber's Encyclopedia Medical Dictionary* (13th ed. 1977). Puberty may occur from the ages of nine to sixteen in girls. *Id.* Thus, for purposes of the statute, a girl might be in a post-pubertal stage anywhere between the ages of nine and seventeen. The statute would effectively prohibit a parent from taking a picture of a post-pubertal ten-year-old without a bathing suit top on at the beach. It would prevent the display of the post-pubertal female breast in a magazine or movie regardless of the context in which the picture was taken. A professional model under the age of 18 who models less than "opaquely covering" lingerie would be considered in a state of nudity. Clearly the context of any picture is of great importance and must be considered in light of the First Amendment. "The First Amendment protects works which, *taken as a whole,*

have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas of these works." *Miller v. California,* 413 U.S. 15, 34; reh. den. 414 U.S. 881 (1973).

In addition, Massachusetts General Law c. 272 § 29A is unlike the New York statute in *Ferber,* where this Court found that the "arguably impermissible application of the statute amount[ed] to . . . a tiny fraction of the material within the statute's reach. *New York v. Ferber* at 773. The Massachusetts statute sweeps more broadly because it does not require that the nudity be obscene, nor sexually explicit, nor lewd. The Massachusetts legislature has recognized this fact. On July 27, 1988, the legislature enacted a new version of § 29A thereby eliminating the version under which this case was filed.[2] The current Massachusetts

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2. SECTION 29A. (a) Whoever, either with knowledge that a person is a child under eighteen years or while in possession of such facts that he should have reason to know that such person is a child under eighteen years of age, and with lascivious intent, hires, coerces, solicits or entices, employs, procures, uses, causes, encourages, or knowingly permits such child to pose or be exhibited in a state of nudity, for the purpose of representation or reproduction in any visual material, shall be punished by imprisonment in the state prison for a term of not less than ten nor more than twenty years, or by a fine of not less than ten thousand nor more than fifty thousand dollars, or by both such fine and imprisonment.

(b) Whoever, either with knowledge that a person is a child under eighteen years of age or while in possession of such facts that he should have reason to know that such person is a child under eighteen years of age, hires, coerces, solicits or entices, employs, procures, uses, causes, encourages, or knowingly permits such child to participate or en-

(Continued on following page)

statute now properly limits prohibited behavior to that carried out with "lascivious intent." Clearly, the statute now before this Court swept more broadly than the statute in *Ferber* and was overbroad without the proper limiting words now present in the new statute. As this Court states, [i]n every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Cantwell v. State of Connecticut,* 310 U.S. 296, 304 (1940). See *Gooding v. Wilson,* 405 U.S. 518, 522 (1972); *National Association for the Advancement of Colored People v. Button,* 371 U.S. 415, 433 (1963). See also *Schad v. Borough of Mount Ephraim,* 452 U.S. 61, 68 (1981); *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 637

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gage in any act that depicts, describes, or represents sexual conduct for the purpose of representation or reproduction in any visual material, or to engage in any live performance involving sexual conduct shall be punished by imprisonment in the state prison for a term of not less than ten nor more than twenty years, or by a fine of not less than ten thousand nor more than fifty thousand dollars, or by both such fine and imprisonment.

(c) In a prosecution under this section, a minor shall be deemed incapable of consenting to any conduct of the defendant for which said defendant is being prosecuted.

(d) For the purposes of this section, the determination whether the person in any visual material prohibited hereunder is under eighteen years of age may be made by the personal testimony of such person, by the testimony of a person who produced, processed, published, printed or manufactured such visual material that the child therein was known to him to be under eighteen years of age, or by expert medical testimony as to the age of the person based upon the person's physical appearance, by inspection of the visual material, or by any other method authorized by any general or special law or by any applicable rule of evidence.

(1980); *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 967 (1984) ("Where, as here, a statute imposes a direct restriction on protected First Amendment activity, and where the defect in the statute is that the means chosen to accomplish the State's objectives are too imprecise, so that in all its applications the statute creates an unnecessary risk of chilling free speech, the statute is properly subject to facial attack.")

Finally, the statute in question is properly invalidated without the need for further state adjudication or refinement:

> We have fashioned this exception to the usual rules governing standing, . . . because of the ' . . . danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.' . . . If the rule were otherwise, the contours of regulation would have to be hammered out case by case—and tested only by those hardy enough to risk criminal prosecution to determine proper scope of regulation. *Dombrowski v. Pfister*, 380 U.S. 479, 486, 487 (1965) quoting *Button* at 433. See *City of Lakewood v. Plain Dealer Publishing Co.*, 108 S.Ct. 2138, 2143 (1988).

The exception carved out for instances when First Amendment rights are abridged is intended to prevent individuals from having to test the application of an overbroad law, thus no further determinations at the state level, which would force the risk of criminal prosecution, are necessary.

Respondent does not debate that the narrow purpose of Massachusetts General Law c. 272 § 29A, as considered by this Court, is legitimate. However, the statute as considered in its overbroad form has a chilling effect which

deters professional movie producers, photographers and many other innocent persons, including parents, from taking pictures containing a person under eighteen who is not completely clothed. These persons who have heretofore exercised their constitutionally protected rights run the risk of prosecution no matter how innocent or tasteful their activity. Because of this overbreadth, Massachusetts General Law c. 272 § 29A was properly deemed invalid.

II. FIRST AMENDMENT OVERBREADTH IS AN APPROPRIATE REMEDY UNDER THE CIRCUMSTANCES OF THE PRESENT CASE.

Although the Massachusetts Supreme Judcial Court did not decide the issue in view of its determination of section I above, the statute is also unconstitutional as it relates to the respondent, Douglas Oakes.

Massachusetts General Law c. 272 § 29A impermissibly restricts respondent's constitutionally protected speech. Therefore, the application of First Amendment overbreadth doctrine by the Massachusetts Supreme Judicial Court is warranted and appropriate within the specific facts of the instant case.

As previously stated the statute is directed at traditional forms of First Amendment activity and expression. See, section I(B) above. Because of the "inherent dangers of undertaking to regulate any form of expression," *Miller* at 23, this Court has devised strict limits on what falls within the permissible scope of First Amendment regulation. While a statute may proscribe what has been deemed unprotected speech, see e.g. *Chaplinsky* at 568 (unprotected speech raises no constitutional question), the

restriction cannot be so broad that it substantially restricts speech that retains First Amendment protection. See *Village of Schaumburg* at 637. The respondent submits that Massachusetts General Law c. 272 § 29A, as it incorporates § 31, is unconstitutional because in regulating unprotected expression, it has made protected expression the subject of a criminal offense.

For several years the standards enunciated in *Miller* were used as guidance in determining the appropriate line dividing protected from unprotected expression. *Ferber* at 753. If material was deemed legally obscene under the *Miller* test it was considered unprotected expression and thus subject to state regulation.

In *Ferber* this Court extended the category of unprotected speech to include non-obscene material depicting sexual conduct by children. *Ferber* at 764. In *Ferber*, a bookstore proprietor was convicted for selling films depicting young boys masturbating under a New York statute which banned the distribution of non-obscene material depicting conduct by children. *Ferber* at 749.

This Court was careful to point out, however, that "laws directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy." *Ferber* at 756. This Court concluded:

> There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment. As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by applicable state law, as written or authoritatively construed. Here, the nature of

> the harm to be combated requires that the offense be limited to works that visually depict sexual conduct below a specified age . . . *Ferber* at 764.

Thus, under *Ferber*, nudity not involving sexual conduct, even if children are involved, retains First Amendment protection. Indeed, the test for child pornography assumes that sexual conduct is present. *Ferber* at 764. Conversely, it is clear that material cannot legally be found to contain child pornography if there is no sexual conduct present. See, Note, *Child Pornography and Unprotected Speech; Supreme Court, 1981 Term*, 96 Harv.L.Rev. 141, 149 (1982) (category of unprotected speech in *Ferber* is restricted to abusive and exploitative material or hard core child pornography.)

The limited holding in *Ferber* does not tie the hands of the state legislature from proscribing the depiction of children in the nude unless the children are involved in some grotesque sexually deviate behavior. The lewd exhibition of the genitals is considered to represent the kind of conduct which a state may permissibly proscribe by including this conduct in its definition of sexual conduct. *Ferber* at 765 quoting *Miller* at 25.

The pictures which led to the respondent's conviction are devoid of any act or pose that can even remotely resemble sexual conduct. The subject is not engaged in any sexually explicit act, nor is the subject's genital area exposed. The pictures are of a nonsexual non-obscene seminude nature. The pictures cannot be considered "pornographic" under *Ferber*, since they contain nothing more harmful or more serious than nudity *per se*. Indeed, the respondent's conviction is a quintessential illustration of

"the hand of the censor becoming unduly heavy." *Ferber* at 756.

By enacting Massachusetts General Law c. 272 § 29A, the Massachusetts Legislature exceeded the constitutionally permissible scope of state regulation. The statute effectively turned a photograph containing semi-nudity without more into evidence of a criminal act. While pictures of the semi-exposed female breast of a person under eighteen years of age may be distasteful to the legislature, the government may not censor what it subjectively finds offensive. See *Young* at 85-87; *Erznoznik* at 205. If the statute's purpose is to prevent child pornography, the Massachusetts Legislature could narrowly draft such a statute limited to, for example, lewd behavior as was done in the current version of the statute. Further, in Massachusetts dissemination of visual material of a child in a state of nudity or sexual conduct was prohibited by Massachusetts General Law c. 272 § 29B which read in part:

> Whoever disseminates any visual material that contains a representation or reproduction of any posture or exhibition in a state of nudity or of any act that depicts, describes, or represents sexual conduct participated or engaged in by a child who is under eighteen years of age, knowing the contents of such visual material or having sufficient facts in his possession to have knowledge of the contents thereof, or whoever has in his possession any such visual material knowing the contents or having sufficient facts in his possession to have knowledge of the contents thereof, with the intent to disseminate the same, shall be punished in the state prison for a term of not less than ten nor more than twenty years or by a fine of not less than ten thousand dollars nor more than fifty thousand dollars or three times the monetary value of any economic gain derived from said dissemination,

> whichever is greater, or by both such fine and imprisonment.

Thus, § 29B greatly limits an individual's attempt at child pornography and renders prohibition of child pornography under § 29A substantially repetitive.

Section 29A's proscription against semi-nudity *per se*, as is evidenced in the present case, is unconstitutionally overbroad because it absolutely proscribes conduct and speech which has heretofore been recognized as protected expression under the First Amendment.

Indeed, as Justice Wilkins of the Massachusetts Supreme Judicial Court stated, "[i]t criminalizes conduct that virtually every person would regard as lawful. Section 29A, for example, makes a criminal of a parent who takes a frontal view picture of his or her naked one-year-old running on the beach or romping in a wading pool." *Commonwealth v. Oakes*, 401 Mass. 602, 605 (1988).

CONCLUSION

For the aforementioned reasons, the judgment of the Supreme Judicial Court should be upheld and affirmed.

Respectfully submitted,

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